Applying the Practicable Alternatives Test
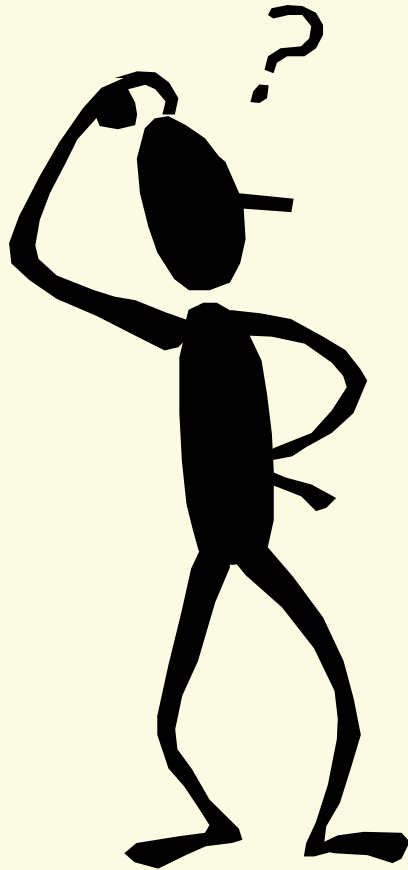
✓ Why do we use this test?

✓ How do we know what's practicable?

✓ The nitty gritty

Why Do We Use the Practicable Alternatives Test?

✓ It's a state water quality standard required under the federal Clean Water Act and Wisconsin Statutes [40CFR Part 131 and s. 144.025(2)(b), Wis. Stats.]

✓ It uses the Corps decision standard for 404 permits [404 B 1 guidelines]

✓ It's a fundamental land use and site planning tool

How DO We Tell What's Practicable?

✔ Definition

✔ Case law precedents

✔ Administrative practice

Definition

✓ NR103.07 (1)

✓ …available and capable of being implemented after taking into consideration cost available technology and logistics in light of overall project purpose.

Case Law Highlights

✓ Agency determines project purpose and whether alternatives meet the purpose

✓ Applicant has burden to demonstrate alternatives aren't practicable

✓ Agency has expertise to review whether data reasonably support conclusions

✓ Agency must not be arbitrary or capricious

Case law highlights

✓ Profitability, cost minimization, prior investment not controlling

✓ Unreasonable cost is basis for impracticability but must be judged in context of project

✓ Can't give undue deference to local zoning

Administrative practice

✓ Reference materials

✓ Training

✓ Regional Aquatic Habitat Experts, Statewide Experts

✓ Database & files

✓ Your decisions - each as part of the whole

The Nitty Gritty

✔Fundamental project purpose

✔Scope of alternatives

✔Quality data

Fundamental project purpose

✓ Agency defines

Scope of alternatives

✓ Analyze obvious alternatives

✓ Use fundamental project purpose to scope

✓ Typical list:

  – Upland

  – Reduced size

  – Rearrangement (s)

  – Alternate sites

  – Construction method or time

  – No action

Quality data

✔ Reliable source

✔ Quantitative

✔ Comparative

✔ Context

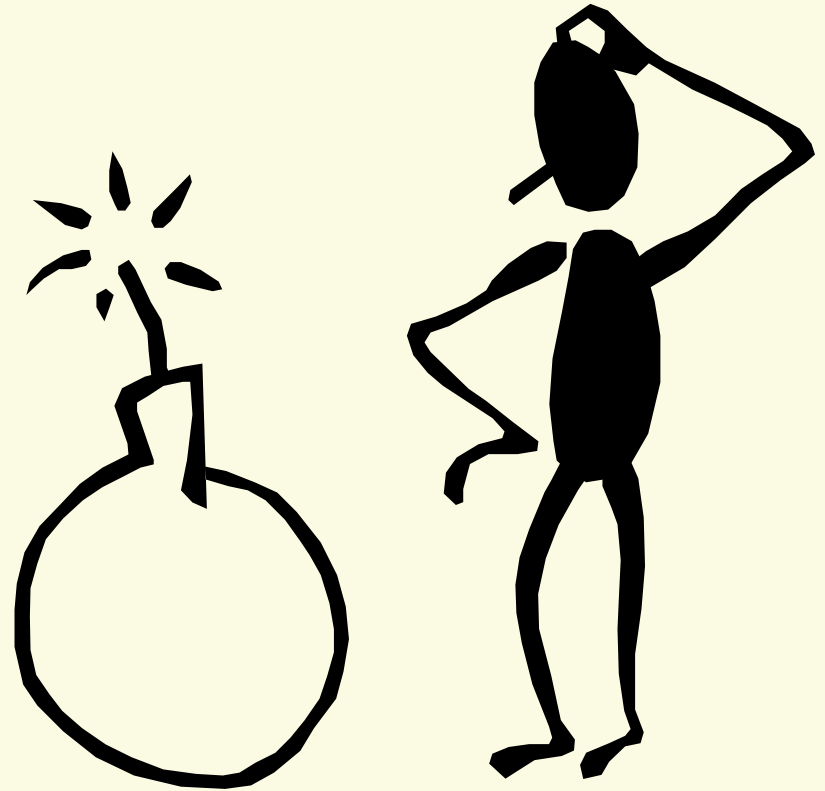◆ *What is the effect?*

◆ *Who is affected?*

◆ *How often?*

◆ *How many?*

◆ *How much $$?*

If only I knew…

✓ Original purchase
   price of property

✓ Total infrastructure
   cost

✓ Project revenue to date

THE KEY: Pre-application conference

✓ Fundamental purpose
✓ Scope of alternatives

➡ Preliminary analysis of potential for compliance